Supreme Court, U.S.
FILED

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No. 97-114 JUL 7 1997

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IN THE

Supreme Court of the United States

October Term 1996

A. MARIA HARRIS,

Petitioner,

v.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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July 7, 1997

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QUESTIONS PRESENTED

In claims brought under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* --

1. Whether reassignment of an employee to a position which the employee allegedly does not have the knowledge, skills or abilities to perform is a "reasonable accommodation."

2. Whether reassignment of an employee to a position which aggravates employee's known disability, and, in which employer fails to provide the agreed upon principal accommodations is a "reasonable accommodation."

3. Whether an employee's status as a "qualified employee" is determined in her original position or in the position to which she has been reassigned and in which the employer asserts she does not have the knowledge, skills or abilities to perform.

4. Whether a "qualified employee" loses her protected ADA status by being reassigned to a position which the employer asserts she does not have the knowledge, skills or abilities to perform.

5. Whether, after reassignment to a position which the employer asserts she does not have the knowledge, skills or abilities to perform, an employer's refusal to further reassign the employee to a different vacant position or return employee to her first position when it became vacant is an actionable failure to accommodate.

6. Whether an employee establishes a *per se* failure to accommodate claim upon showing that for 11 month-

period employer failed to provide agreed-upon principal accommodations; employer evaluated employee's performance during that period as warranting termination; and employee was terminated.

7. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims failure to accommodate.

8. Whether employee proffers sufficient direct evidence of disability discrimination to survive defendants' motion for summary judgment upon showing that employer, having reassigned employee to a position for which it asserts employee is "unqualified"; which position aggravates employee's known disability; and, in which it fails to provide the agreed upon principal accommodations, terminated employee after refusing employee's accommodation requests to be returned to her first position when it became vacant or to be reassigned to a different vacant position.

9. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims retaliation.

10. Whether employee proffers direct evidence of unlawful retaliation upon showing that employer failed to provide reasonable accommodations and discriminated against her subsequent to employee's filing of two Equal Employment Opportunity complaints alleging disability and race discrimination.

11. Whether the court below erred in holding that, on employer's motion for summary judgment on employee's ADA and Rehabilitation Act claims, despite evidence from

plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the employer's decision is conclusive on issue of whether employee was able to perform the essential functions of her job.

12. Whether plaintiff's right to receive prior to termination the fact finding process set forth in the County's regulations for permanent employees is protected by the Fourteenth Amendment.

13. Whether employee proffers sufficient direct evidence of race discrimination under Title VII to survive defendants' motion for summary judgment upon showing that employer accommodated similarly-situated white, disabled co-worker.

Parties to the Proceeding
in the
United States Court of Appeals for the Fourth Circuit

A. MARIA HARRIS,
APPELLANT

ARLINGTON COUNTY, VIRGINIA;
ANTON S. GARDNER, County Manager;
RON CARLEE, Director, Department of Human Services;
SUSANNE EISNER, Department of Human Services; KITTY CLARK, Department of Personnel;
KAY WEST, Department of Human Services;
MARSHA ALLGEIER, Department of Human Services;
CECILIA TANNER, Department of Human Services; and
WALTER ZAUMSEIL, Department of Human Services;
APPELLEES.

There were no corporate parties to the proceeding in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

A. Maria Harris respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this petition is unpublished but is reprinted as App. A-1 through A-3. The opinion of the United States Court of Appeals for the Fourth Circuit on the Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc is unpublished but is reprinted as App. A-4 through A-5. The order and memorandum opinion of the United States District Court for the Eastern District of Virginia is also unpublished but is reprinted at App. A-6 and App. A-7 through A-12, respectively. The opinion of the United States District Court for the Eastern District of Virginia on the Petitioner's Motion to Reconsider/Amend the Entry of Summary Judgment is unpublished but is reprinted at App. A-13.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on March 12, 1997. A. Maria Harris' Petition for Rehearing with Suggestion for Rehearing In Banc was denied April 8, 1997. The jurisdiction of the United States Supreme Court is invoked under the United States Constitution and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

I. U.S. CONST. Amend 14.

* * *

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

II. 42 U.S.C. § 12111(8)

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, ...

III. 42 U.S.C. § 12111(9)

The term "reasonable accommodation" may include-

* * *

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

IV. 42 U.S.C. § 12112

(a) GENERAL RULE.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.

As used in subsection (a) of this section, the term "discriminate" includes-

* * *

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; . . .

* * *

STATEMENT OF THE CASE

I. Factual Background

Petitioner A. Maria Harris (hereinafter, "Mrs. Harris") has Multiple Sclerosis, a condition which was first diagnosed before she was hired by Arlington County, Virginia in 1989. Mrs. Harris was hired as a Job Development Specialist at pay above entry, due to her "extensive job related experience" and "extensive public speaking experience" (Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment ("Pl.'s Mem. Opp. Summ. J."), Ex. 1)). After a one year probationary period required of all County employees, her work performance earned her permanent employee status with the County (Pl.'s Mem. Opp. Summ. J., Ex. 2).

After becoming a permanent employee, Mrs. Harris disclosed her diagnosis to her supervisor and was thereafter blatantly discriminated against on the basis of her disability. In April 1991 her supervisor asked her to quit her job because no one wanted to work with her because of her Multiple Sclerosis, and told Mrs. Harris that she was being forced to "write her up." After her May 1991 Equal Employment Opportunity ("EEO") complaint (Pl.'s Mem. Opp. Summ. J., Ex. 5) based on this behavior *was found in her favor* (Pl.'s Mem. Opp. Summ. J., Ex. 11) and her supervisor had resigned, the County developed a reasonable accommodation plan for her disabilities resulting from her Multiple Sclerosis (Pl.'s Mem. Opp. Summ. J., Ex. 11). However, Mrs. Harris continued to suffer discrimination on this first jobsite. Her co-workers would not talk with her and she was told she was on a "hit list," but much of what Mrs. Harris complained involved her new supervisor, Karis Obrenski, who repeatedly failed to implement the accommodations outlined in the reasonable accommodation plan (Pl.'s Mem. Opp. Summ. J., Ex. 11, 12).

A year after the implementation of the reasonable accommodation plan, Mrs. Harris was meeting her employer's

performance expectations for continued employment as reflected on her performance evaluation. Nonetheless she disputed the evaluation because she was evaluated by Ms. Obrenski less favorably than a white, non-disabled co-worker whom Mrs. Harris could show statistically that she had outperformed. This April 1992 performance appraisal (Pl.'s Mem. Opp. Summ. J., Ex. 25) graded her Satisfactory in two elements, Needs Improvement in one and Unsatisfactory in one having to do with quantitative performance (Pl.'s Mem. Opp. Summ. J., Ex. 25). Mrs. Harris formally contested this last element at the time with the statistics she had gathered showing her performance relative to that of her co-worker (Pl.'s Mem. Opp. Summ. J., Ex. 12,13). Mrs. Harris showed that she met and exceeded her performance goals for this period (*id.*) and statistically outperformed her white co-worker (*id.*).

Mrs. Harris performed very well in her position as Job Development Specialist. Suzanne Eisner admitted in her deposition that she and Karis Obrenski, Mrs. Harris' immediate supervisor, had reviewed the statistics at the time, and that she found no errors in them that she could recall at the time of her deposition (Pl.'s Mem. Opp. Summ. J., Eisner Depo. at 130). (Ms. Obrenski was unavailable for deposition). Mrs. Eisner also admitted in her deposition that she never told anyone that as a result of Mrs. Harris' performance she thought it would be better for Mrs. Harris to be in another position (Pl.'s Mem. Opp. Summ. J., Eisner Depo. at 145-147). Mrs. Harris' department head, Ron Carlee, commended Mrs. Harris' performance in a contemporaneous letter to her (Pl.'s Mem. Opp. Summ. J., Ex. 14) and she received numerous letters commending her performance from persons outside the County with whom she worked (Pl.'s Mem. Opp. Summ. J., Ex. 15-24). Mrs. Harris' performance in her first position was considered to be outstanding by her superiors and persons in the community with whom she worked.

Mrs. Harris filed a second EEO complaint based on her evaluation by Ms. Obrenski and the County's failure to implement

the agreed-upon accommodations, claiming race discrimination and retaliation resulting from her disability discrimination claim (Pl.'s Mem. Opp. Summ. J., Ex. 26). The County was unable to resolve the discrimination about which she was complaining and concluded that the situation was "unworkable." In August 1992 Mrs. Harris was offered a reassignment to another position with the County as an accommodation. Her reassignment out of this first job occurred after *and resulted from* her filing a second EEO complaint of retaliation and race discrimination and the County's determination that the situation was "unworkable."

As a "reasonable accommodation" the County reassigned Mrs. Harris to a position, Eligibility Worker I, which they knew would cause her to have to complete, by hand, hundreds of forms, often in triplicate with carbon paper. This was work which they knew would aggravate her by then well-known disability -- the inability to use her hands, especially her writing hand -- resulting from her Multiple Sclerosis. Upon reassigning her to this position, the County had proposed to accommodate Mrs. Harris in this reassignment position by computerizing these forms so Mrs. Harris could complete the forms with the use of a keyboard.

As early as November 1992 the County knew that it was difficult, and would continue to be difficult, to computerize the forms in order to accommodate Mrs. Harris' disability in this position (Pl.'s Mem. Opp. Summ. J., Ex. 34). It also knew that it could not provide this accommodation in a timely manner. According to memoranda written in November 1992, the County knew then that the computerization work would be difficult to implement with the County's existing personnel and assignments and that the work could not even be begun until January 1993 (Pl.'s Mem. Opp. Summ. J., Ex. 34).

Mrs. Harris attempted to work in the Eligibility Worker I position, despite the lack of computerization of forms for nearly a year. Nevertheless, Mrs. Harris' performance was repeatedly evaluated during this period of non-accommodation (Pl.'s Mem. Opp. Summ. J., Ex. 37, 39, 40, 46, 47, 48). On June 7, 1993, Mrs.

Harris' supervisor Kay West admitted in a "confidential" memorandum that after eleven months on the job, only one of the forms which were Mrs. Harris' principal accommodation was available to her on the computer (Pl.'s Mem. Opp. Summ. J., Ex. 49).

In her "confidential" memorandum dated June 7, 1993 (*id.*), Mrs. West not only admits that Mrs. Harris had not been accommodated, she states her understanding that Mrs. Harris cannot be evaluated without her accommodations, and that "she [Mrs. Harris] will not have sufficient time using full accommodations . . . for an adequate evaluation of her performance to be done." (*Id.*). Despite this knowledge, on July 2, 1993 Mrs. West informed the plaintiff that she is contemplating termination (Pl.'s Mem. Opp. Summ. J., Ex. 50). By July 28, 1993, Mrs. West has evaluated Mrs. Harris' performance to be insufficient for continued employment (Pl.'s Mem. Opp. Summ. J., Ex. 51). While **knowing** that the accommodations have not been provided and that she cannot evaluate Mrs. Harris' performance without accommodation, Mrs. West concluded that she **will** recommend Mrs. Harris' termination if her work does not improve in the next few weeks (*id.*). Kay West reached the decision, absent accommodations, that Mrs. Harris' performance as an Eligibility Worker I was inadequate and she should be terminated.

Despite recognizing that her reassignment was "not . . . a good job match" (Pl.'s Mem. Opp. Summ. J., Ex. 64) as they later termed it, and despite Mrs. Harris' requests to be returned to her first position or further reassigned, the County kept her at the position of Eligibility Worker I. When her first position with the County, Job Development Specialist, became vacant, Mrs. Harris applied for the opening but was rejected on July 14, 1994 as "unqualified." (Pl.'s Mem. Opp. Summ. J., Ex. 70).

Mrs. Harris retained counsel and continued to work as an Eligibility Worker I during negotiations between her counsel and the County. Mrs. Harris' counsel repeatedly requested that Mrs.

Harris be reassigned to another position or returned to her first position (Pl.'s Mem. Opp. Summ. J., Ex. 79). The County purported to be seeking other positions for Mrs. Harris within the County, but asserted that it had found none that would "justify a permanent reallocation of the County's resources." (Pl.'s Mem. Opp. Summ. J., Ex. 62). Mrs. Harris continuously applied for other County positions but found that her applications were regularly rejected (Pl.'s Mem. Opp. Summ. J., Ex. 68,69,70,71,72).

Having been denied her repeated requests to be given another job or to be given her first position back, Mrs. Harris filed her complaint at the Equal Employment Opportunity Commission ("EEOC"). When Mrs. Harris' termination was formally recommended her counsel filed objection to it (Pl.'s Mem. Opp. Summ. J., Ex. 79), immediately challenging the County's plan to utilize the "at will" employee termination procedure contained in the County's regulations. Mrs. Harris was entitled to her civil service protection which included a lengthy termination procedure available to permanent employees (Pl.'s Mem. Opp. Summ. J., Ex. 73 at Regulation 2.7, Rule 12, §5). Indeed, she had requested and was given written assurances from the County that she did not lose permanent status as county employee with civil service protection by accepting the reassignment to the Eligibility Worker I position (Pl.'s Mem. Opp. Summ. J., Ex. 43). Without prior warning or access to the fact finding grievance due her under County's rules (Regulation 2.7, Rule 12, §5) Mrs. Harris was terminated on March 21, 1995, effective that day (Pl.'s Mem. Opp. Summ. J., Ex. 65). The County Manager stated that Mrs. Harris' "separation is based upon the apparent mismatch between [her] knowledge, skills, and abilities and those required to perform the duties of the Eligibility Worker I position. (*Id.*) Mrs. Harris' right to sue letter was subsequently issued by the EEOC.

II. Procedural Background

On June 22, 1995, Mrs. Harris brought an action based on violations by the County of the ADA and Rehab Act, Title VII, the Fourteenth Amendment, and 42 U.S.C. §§ 1981, 1983, 1985 and 1986. The bases for jurisdiction were 28 U.S.C. §§ 1331 and 1343. She contended that the County discriminated against her on the basis of her disability, failed to accommodate her, retaliated against her for pursuing her rights under the disability laws, and deprived her of the termination procedure which she was due as a permanent County employee. The Defendants filed an Answer on July 17, 1995 denying the material allegations in Mrs. Harris' Complaint. Discovery ensued and closed October 13, 1995, pursuant to scheduling order. The Defendants filed a Motion for Summary Judgment on December 1, 1995. Without holding a hearing on the merits of the motion, the District Court granted Defendants' Motion for Summary Judgment on December 22, 1995, entering judgment in favor of all Defendants on all counts. The Court's Memorandum Opinion cited no case authority. App. A-7 - A-12.

Mrs. Harris filed a Motion to Reconsider/Amend the Entry of Summary Judgment on the grounds that she had presented probative evidence that the employer's asserted legitimate nondiscriminatory reason for her discharge was pretextual -- she presented evidence that she was a proficient worker in both positions she held and evidence showing the defendants' only witness on the performance issue, Kay West, to be unworthy of credence; that the District Court had incorrectly applied the law to her case; and that the District Court had impermissibly and erroneously made findings of fact. The District Court responded with an Order on January 26, 1996 denying the Motion. App. A-13.

Mrs. Harris appealed the grant of summary judgment to the United States Court of Appeals for the Fourth Circuit on the grounds that the District Court erred when it failed to find Mrs.

Harris both presented direct evidence of discrimination and met her burden under *McDonnell Douglas*; the District Court erred when it ruled that, in the absence of a showing of bad faith, the testimony of Mrs. Harris' supervisor was conclusive on the issue of whether she could perform the essential functions of her position; the District Court erred when it failed to find that it was unreasonable to reassign Mrs. Harris to a position which aggravated her disability or to a position which she was allegedly "unqualified"; the District Court impermissibly and erroneously decided numerous disputed issues of material fact; and, the District Court erred in failing to find that Mrs. Harris' rights secured by the Fourteenth Amendment were violated. The basis for jurisdiction in the Court of Appeals was 28 U.S.C. § 1291.

On appeal, the Fourth Circuit affirmed the grant of Summary Judgment on the reasoning of the District Court with an unpublished per curiam opinion. App. A-1 - A-3. Mrs. Harris' Petition for Rehearing was denied. App. A-4 - A-5.

REASONS FOR GRANTING THE WRIT

I. THE "REASONABLENESS" OF A REASSIGNMENT ACCOMMODATION AND THE MEANING OF "QUALIFIED EMPLOYEE" INVOLVE IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Without applying any criteria for determining when an "accommodation" is "reasonable" and without analyzing Mrs. Harris' claim that she was denied a reassignment reasonable accommodation, the District Court found, in reasoning affirmed by the Fourth Circuit, that the Defendants "made every effort to accommodate plaintiff" (App. A-7) and that "the County bent over backwards to accommodate plaintiff's disability." App. A-10.

With regard to Mrs. Harris' claims of discrimination, the District Court did not analyze plaintiff's direct evidence. Apparently applying a modified *McDonnell-Douglas* analysis, the District Court concluded that even if Mrs. Harris could state a *prima facie* case of race discrimination she did not show that the County's stated legitimate non-discriminatory reason for her firing -- unsatisfactory performance -- was pretextual (App. A-11); and that Mrs. Harris' claim of disability discrimination similarly failed because she was fired due to her unsatisfactory performance, which was the result of her poor understanding of public assistance policies, not the Defendants' failure to provide accommodations (App. A-11).

The District Court granted summary judgment, holding that:

> [d]espite some evidence from plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the management decision that she was unable to perform the essential functions of her job must be given some

weight.

App. A-11 - A-12. This holding appeared to relate to the court's holding that Mrs. Harris had not shown on her disability discrimination claim that the employer's alleged legitimate reason, performance, was pretextual, as well as to dispose of the issue of whether Mrs. Harris was a "qualified individual with a disability."

The ADA defines this term "qualified individual with a disability" as meaning,

> an individual with a disability who, with or without reasonable accommodation, can *perform the essential functions of the employment position* that such individual holds or desires.

42 U.S.C. § 12111(8) (emphasis added).

The District Court's analysis of Mrs. Harris' claims was affirmed by the Fourth Circuit. This was not unexpected. Petitioner is unaware of any cases decided by the Fourth Circuit in which the Court analyzed reassignment as a reasonable accommodation and concluded that reassignment was appropriate.

In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995) (*"Myers"*), the Fourth Circuit held that,

> [t]his circuit has made it clear, however, that the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position.

Myers, 50 F.3d at 284 (*Citing Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992)).

Relying on *Myers*, the District Court held in *Williams v. Avnet*, 910 F.Supp. 1124 (E.D.N.C. 1995), that reassignment to a

vacant position can *never* be a reasonable accommodation in ADA cases. *Id.* at 1131. On appeal, the Fourth Circuit noted in *dicta* in *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996) (*"Williams"*) that [obviously] such a holding is contrary to congressional direction and its holding in *Myers* had been misconstrued. The Fourth Circuit attempted to rehabilitate its decision in *Myers* by proclaiming in *dicta* that "*Myers* noted only that a particular accommodation does not become federally mandated merely because an employer 'elects to establish it as a matter of policy.'" *Williams*, 101 F.3d at 348 n. 4.

Although the Fourth Circuit has recognized in *dicta* that reassignment is a statutorily-defined form of reasonable accommodation, it failed to reverse the District Court's grant of summary judgment on this issue in the case at bar.

Mrs. Harris' claims involved more than her request to be reassigned from the Eligibility Worker I position as a reasonable accommodation. Mrs. Harris had been reassigned from her first position as a Job Development Specialist as a result of filing an EEO complaint alleging retaliation and race discrimination, and the County's subsequent determination that the "situation was unworkable."

Mrs. Harris claimed in the District Court that the County *had not provided her a "reasonable" accommodation* by *reassigning her from her first position as Job Development Specialist, in which she was performing satisfactorily, to a position as Eligibility Worker I in which she was allegedly "unqualified," in which the defendants failed to accommodate her known disabilities, and which aggravated her known disabilities.* The County's reassignment of Mrs. Harris thus raised the questions:

- Whether reassignment of an employee to a position which the employee allegedly does not have the knowledge, skills or abilities to perform is a "reasonable accommodation;"

- Whether reassignment of an employee to a position which aggravates employee's known disability, and, in which employer fails to provide the agreed upon principal accommodations is a "reasonable accommodation;"

- Whether an employee's status as a "qualified employee" is determined in her original position or in the position to which she has been reassigned and in which the employer asserts she does not have the knowledge, skills or abilities to perform; and

- Whether a "qualified employee" loses her protected ADA status by being reassigned to a position which the employer asserts she does not have the knowledge, skills or abilities to perform.

These issues will often arise in ADA and Rehabilitation Act cases involving reassignment accommodations. The Seventh Circuit recently considered such questions in *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir. 1996), and the Eighth Circuit has approached these issues in *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). Petitioner is unaware of any opinion by this Court addressing these specific issues in the context of a reassignment. With guidance from this Court on the meaning of "qualified employee," the "reasonableness" of a reassignment accommodation, and the rights of an employee to subsequent reassignment, employers and employees may better understand how the ADA and Rehabilitation Act affects employment decisions.

The criteria for determining when a reassignment or other accommodation is "reasonable" and the meaning of "qualified employee" in the context of a reassignment are important questions of federal law that should be settled by this Court. The Court should grant this petition for certiorari and set forth standards addressing these specific issues.

II. THE FOURTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS REGARDING THE ANALYSIS OF PLAINTIFF'S EVIDENCE OF FAILURE TO ACCOMMODATE AND DISABILITY DISCRIMINATION.

A. The Fourth Circuit did not recognize Mrs. Harris' direct evidence that the County failed to accommodate her, discriminated against and retaliated against her.

Plaintiff claimed in the case at bar that the County failed to accommodate her disability; discriminated against her in the terms of her employment and discharge and retaliated against her after she sought accommodations and complained of discrimination. Petitioner presented significant and probative direct evidence of her claims, most notably in the form of documentary evidence. Petitioner's Statement of the Case, *supra at 4*, contains citations to her documentary evidence attached to her opposition to Defendants' motion for summary judgment.

By way of illustration, and for the purposes of this Petition (given the page restrictions), Petitioner here will only address one particular grouping of the County's own internal memoranda written by defendants which show failure to accommodate. The defendants reassigned Mrs. Harris to a position which they knew would aggravate her disability, failed to accommodate her in that position for nearly one year, evaluated her performance during that period as warranting termination, and refused to further reassign her.

As early as November 1992 the County knew that it was difficult, and would continue to be difficult, to

computerize the forms in order to accommodate Mrs. Harris' disability in the position to which she had been reassigned (Pl.'s Mem. Opp. Summ. J., Ex. 34). It also knew that it could not provide this accommodation in a timely manner. According to memoranda written in November 1992, the County knew then that the computerization work would be difficult to implement with the County's existing personnel and assignments and that the work could not even be begun until January 1993 (Pl.'s Mem. Opp. Summ. J., Ex. 34).

Mrs. Harris attempted to work in the Eligibility Worker I position, despite the lack of computerization of forms for nearly a year. Mrs. Harris' performance was repeatedly evaluated during this period of non-accommodation (Pl.'s Mem. Opp. Summ. J., Ex. 37, 39, 40, 46, 47, 48). On June 7, 1993, Mrs. Harris' supervisor Kay West admitted in a "confidential" memorandum sent to her superiors that after eleven months on the job, only one of the forms which were Mrs. Harris' principal accommodation was available to her on the computer (Pl.'s Mem. Opp. Summ. J., Ex. 49).

In her "confidential" memorandum dated June 7, 1993 (*id.*), Mrs. Harris' supervisor, Kay West, not only admitted that Mrs. Harris had not been accommodated, she stated her understanding that Mrs. Harris cannot be evaluated without her accommodations, and that "she [Mrs. Harris] will not have sufficient time using full accommodations . . . for an adequate evaluation of her performance to be done." (*Id.*). Despite this knowledge, on July 2, 1993 Mrs. West informed the plaintiff that she is contemplating termination (Pl.'s Mem. Opp. Summ. J., Ex. 50). By July 28, 1993, Mrs. West evaluated Mrs. Harris' performance to be insufficient for continued employment (Pl.'s Mem. Opp. Summ. J., Ex. 51). Kay West never varied from this initial conclusion to terminate, reached in

the absence of accommodations, and plaintiff was thereafter terminated.

Plaintiff argues here that she presented significant direct evidence of failure to accommodate and disability discrimination.

Unlike other Circuit Courts, the Fourth Circuit appears to have been unimpressed by direct evidence such as that proffered by Mrs. Harris. In the case at bar, the District Court, its reasoning affirmed by the Fourth Circuit, did not consider plaintiff's direct evidence of disability discrimination. Instead, the Court applied solely a modified *McDonnell Douglas* framework to analyze plaintiff's evidence.

Moreover, the District Court erred in articulating the modified *McDonnell Douglas* framework *(see Section III, infra*) and erred in disregarding plaintiff's evidence of pretext (she was a proficient worker in both positions and only defense witness on performance is unworthy of credence).

The District Court, in reasoning affirmed by the Fourth Circuit, did not consider whether a reassignment of Mrs. Harris was a reasonable accommodation. Thus, it did not discuss whether any positions were available, or whether plaintiff had established that she had applied for, and was qualified for, her prior position, when it became vacant, or other vacant positions.

Rather, the District Court considered "reasonable accommodations" only as it related to plaintiff's performance in the specific job of Eligibility Worker I. The District Court completely disregarded the parties' factual dispute over plaintiff's principal accommodation, holding, "[t]he court is not persuaded by the parties' disagreement over the computerized forms " (App. A-11). Finding that the County provided "extensive accommodations" (App. A-9) the Court concluded that the County "bent over

backwards to accommodate plaintiff's disability (App. A-11). Therefore, the Court granted summary judgment in favor of the defendants on Mrs. Harris' failure to accommodate claims.

Mrs. Harris challenged the grant of summary judgment on appeal. Mrs. Harris contended that she would have been qualified to perform the requirements of her first position or several others as they became vacant. In the District Court she proffered evidence that she had applied for and been rejected as unqualified by the County for several positions, including her original position within which she had attained permanent employee status, and for which she had originally been hired at above-grade pay due to her specialized skills.

The District Court erred in not considering Mrs. Harris' allegations that she requested reassignment to other vacant positions, including her former position. The District Court erred in not considering that the County rejected her for all of these positions and refused to permit her to return to her first position. The District Court erred in not considering that the County ultimately concluded in a letter to Mrs. Harris' counsel that it had no obligation under the law to reassign Mrs. Harris because it had found no position that would "justify a permanent reallocation of the County's resources" (Pl.'s Mem. Opp. Summ. J., Ex. 62), despite the fact that she had already reallocated the County's resources by being reassigned. The Court should have considered whether reassignment was a reasonable accommodation.

The Court should have considered Mrs. Harris' complaint that the County was constrained to treat her the same as all other employees, and that under the County's personnel regulations, she should have been permitted to return to her first position. The Court completely disregarded documentary evidence showing that Mrs.

Harris had requested and been given written assurances that she would not lose her permanent status as a County employee upon accepting the reassignment to the Eligibility Worker I position (Pl.'s Mem. Opp. Summ. J., Ex. 43). As to plaintiff's Fourteenth Amendment claims and claims under 42 U.S.C. Sections 1981, 1983, 1985 and 1986, the court concluded simply that even if Mrs. Harris was a permanent employee and entitled to due process protections, "she clearly was given all the protections she was due." App. A-12.

B. Other circuits, when presented with direct evidence, have set forth the elements of reasonable accommodation claims, discrimination claims, and defenses thereto, and test such claims through the application of traditional burdens of proof.

The Sixth Circuit set forth in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1182 (6th Cir. 1996) (*"Monette"*), an approach for analyzing claims of disability discrimination in cases in which the employer admits reliance on the disability, or other direct evidence of discrimination exists. Assuming that the plaintiff in such a case is in fact statutorily "disabled," in such cases, it reasoned, the disputed issue will almost always be whether the employee is "otherwise qualified" to perform the job.

The Court identified two broad categories of cases: 1) those in which the plaintiff is not seeking a reasonable accommodation but is instead making the straightforward claim that he or she can in fact function capably in the sought after position as it exists; and 2) those in which the plaintiff challenges a particular job requirement as unessential or claims that he or she can do the job with reasonable accommodations on the part of the employer.

Id. at 1182.

The Court concluded that whether the employee is "otherwise qualified," with or without reasonable accommodation, to perform the job, is a factual dispute capable of resolution through traditional methods of proof. *Id.* at 1183.

In cases in which the plaintiff claims to be qualified to perform the essential functions of the job without reasonable accommodation, and the employer's defense is that the employee's handicap precludes satisfactory job performance, "objective evidence will suffice to establish . . . whether the employee's handicap renders him or her unqualified to perform the essential functions of the job." *Id.*

In cases in which the plaintiff is seeking some accommodation on the part of the employer, and is claiming that he or she would be qualified to perform the essential functions of the job with such reasonable accommodation, the disputed issues will be whether such accommodation is reasonable, whether such accommodation would impose an undue hardship upon the employer, and/or whether the plaintiff is capable of performing the job even with the suggested accommodation, each of which may also be resolved through direct, objective evidence. *Id.*

Other circuits have also similarly set forth the elements of claims, the defenses thereto and the burdens of proof. *See, e.g., Healy v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132-33 (3rd Cir. 1996) (Title VII case); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995) (disability case); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996) (disability case).

This Court should grant this petition for certiorari and provide guidance to the development of disability civil rights jurisprudence.

III. THE RESULT IN THE CASE AT BAR IS EVIDENCE OF A SERIOUS FLAW WHICH HAS DEVELOPED IN THE JURISPRUDENCE OF DISABILITY CIVIL RIGHTS -- THE INAPPROPRIATE APPLICATION OF THE *McDonnell Douglas* BURDEN-SHIFTING FRAMEWORK.

The Sixth Circuit expressly held in *Monette*, 90 F.3d at 1182, that the *McDonnell Douglas* burden-shifting test is not warranted or appropriate in every disability discrimination case. The Court held that "[t]he test is inappropriate for cases in which the employer acknowledges that it relied upon the plaintiff's handicap in making its employment decision." *Id.* The Sixth Circuit reasoned that,

> the *McDonnell Douglas* burden-shifting approach is unnecessary because the issue of the employer's intent, the issue for which *McDonnell Douglas* was designed, has been admitted by the defendant in such cases, and the plaintiff has direct evidence of discrimination on the basis of his or her disability.

Id. The Sixth Circuit noted that, in cases where other direct evidence of discrimination exists, when an employer has not admitted its intent, but where the evidence establishes that its decision was based upon the employee's disability, application of the *McDonnell Douglas* burden-shifting framework is also inappropriate. *Id.* at 1180.

Although the Fourth Circuit failed to reverse the inappropriate application of *McDonnell Douglas* to plaintiff's direct evidence in the case at bar, the Court has, in *dicta*, previously noted the problem of inappropriate application of the *McDonnell Douglas* burden-shifting framework.

In *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996) (*"Williams"*), the Fourth Circuit noted

that the parties did not dispute that the reason that Channel Master did not permit Williams to return to her job was that her back injury prevented her from performing her assigned tasks without accommodation. The Court noted that the *McDonnell Douglas* burden-shifting framework is designed to circumvent a factual dispute over the reasons for discharge. *Williams*, 101 F.3d at 348 n. 1. The Court pointed out in *dicta*: the *McDonnell Douglas* inferential proof scheme is not appropriate when, as in that case, the reason for the discharge is undisputed. *Id.*

The Fourth Circuit, however, has apparently failed to recognize that *McDonnell Douglas* burden-shifting is equally inappropriate in cases in which plaintiff proffers direct evidence of unlawful action.

The District Court's decision in the case at bar involved just such a misapplication of the *McDonnell Douglas* inferential proof scheme. Notwithstanding plaintiff's presentation of direct evidence of discrimination, the District Court found that plaintiff's claim did not survive defendant's motion for summary judgment because, applying a *McDonnell Douglas* indirect proof scheme, the employer could merely *articulate* a legitimate, nondiscriminatory reason for the adverse action.

The District Court failed to analyze whether the particular reassignment in the case at bar was a reasonable accommodation or whether further reassignment would have been a reasonable accommodation. Nonetheless, the Fourth Circuit affirmed the District Court's entry of summary judgment on the reasoning of the District Court.

The misapplication of a *McDonnell Douglas* indirect proof scheme is particularly inappropriate where, as here, the District Court, in reasoning affirmed by the Fourth Circuit, employed a standard which is insurmountable by plaintiff: on defendant's motion for summary judgment, even assuming plaintiff has established the elements of her *prima facie* case in the absence of plaintiff's showing of bad faith, the employer's decision is conclusive on the issue of the employee's performance, the

employer's articulated legitimate non-discriminatory reason for the adverse action. (App. A-11 - A-12).

Such a standard gives conclusive effect on summary judgment to the opinion of the employer on the very issue plaintiff must oppose -- defendant's legitimate non-discriminatory reason for its adverse action. This deprives plaintiff of a meaningful opportunity to present evidence that the proffered explanation is pretextual. In effect, by affirming the entry of summary judgment on the reasoning of the District Court, the Fourth Circuit has elevated the employer's burden to articulate a legitimate, nondiscriminatory reason for the adverse action in the *McDonnell Douglas* burden-shifting indirect proof scheme to the status of the perfect irrefutable defense.

This Court has held in a Title VII case that *McDonnell Douglas* burden-shifting is not applicable where the plaintiff presents direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523 (1985).

The Third Circuit recently held in a Title VII case that the *McDonnell Douglas* framework does not apply in cases where direct evidence of discrimination exists. *Healy v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 131-32 (3rd Cir. 1996).

The Tenth Circuit established in *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981) (*"Pushkin"*) (Rehabilitation Act claim) a modified *McDonnell Douglas* approach for disability discrimination claims brought in that Circuit. Recently, however, in *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995) (*"White"*), the Tenth Circuit recognized that the *McDonnell Douglas* framework is not applicable when the employer admits taking the employee's handicap into account in making its employment decision, and instead attempts to defend its decision on the ground that the plaintiff is not otherwise qualified for the position, with or without reasonable accommodation. The Court stated,

> Where, as here, an employer readily acknowledges that the decision to terminate the employee was premised, at least in part, on the employee's disability, the ultimate purpose of the *Pushkin* analysis will have been achieved from the outset. In such cases, the objective claims presented may be tested through the application of traditional burdens of proof. . . .

White, 45 F.3d 357, 361 n. 6.

In *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 762 (5th Cir. 1996), the Fifth Circuit held that where plaintiff has direct evidence, the Court need not engage in *McDonnell Douglas* presumptions in order to infer discrimination.

All of these cases appear to suggest that, where direct evidence is presented by plaintiff in support of disability discrimination claims, this direct evidence should be analyzed without *McDonnell Douglas* burden-shifting. In the case at bar, the District Court misapplied *McDonnell Douglas* burden-shifting, which reasoning was affirmed by the Fourth Circuit.

The ADA and the modified provisions of the Rehabilitation Act are relatively new legislation. How these Acts are to be interpreted is somewhat uncertain. Employers must not violate the ADA and Rehabilitation Act but at the same time cannot know the standards that apply to their behavior. Employees must have guidance in determining the likely consequences of their disabilities on their employment. This tension is significant and affects hundreds of thousands of employers and employees, yet the petitioner is unaware of any opinion by this Court addressing this specific issue in the context of disability discrimination claims. This Court should grant this petition for certiorari and set forth standards addressing appropriate application of *McDonnell Douglas* burden-shifting in the context of disability claims.

IV. THE FOURTH CIRCUIT HAS SANCTIONED A DISTRICT COURT DECISION THAT IS WITHOUT BASIS IN AMERICAN JURISPRUDENCE, REQUIRING THIS COURT TO UTILIZE ITS SUPERVISORY POWER.

The Constitution vests in this Court "the judicial Power of the United States" which extends to "all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States." U.S. Const. Art. III. By statute, this Court has power to review the decisions of the United States courts of appeals. 28 U.S.C. § 1254.

This Court should utilize its supervisory power to address petitioner's complaint that the District Court, in reasoning affirmed by the Fourth Circuit, applied a legal standard that is without basis in this Court's jurisprudence -- on employer's motion for summary judgment on employee's Title VII, ADA and Rehabilitation Act claims, a modified *McDonnell Douglas* burden-shifting framework is to be applied to plaintiff's direct evidence and despite evidence from plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the employer's decision is conclusive on the issue of whether the employee was able to perform. (App. A-12).

As noted, *supra*, such a standard departs from this Court's guidelines set forth in *McDonnell Douglas* and its progeny. In effect, it wrongfully deprives a plaintiff from having a meaningful opportunity to present evidence that the employer's proffered explanation is pretextual.

This Court should exercise its supervisory power and grant the Petitioner's Writ of Certiorari to the Fourth Circuit to review this decision.

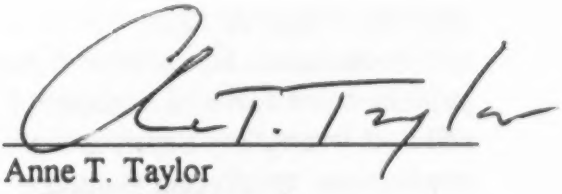
CONCLUSION

The injustice that was served upon Mrs. Harris by the entry of the District Court's grant of summary judgment, applying a rule of law without basis in our jurisprudence and absent even a hearing on the motion, is compelling. However, the most important aspect of the case at bar is not that Mrs. Harris was denied relief to which she was entitled under the statutes.

Rather the most important aspect of the case at bar is that it serves to illustrate that there are thousands of employees who, depending upon the federal circuit in which they live, have differing rights under the same statutory standards. This variance of interpretation of federal statutory law is precisely what the Supreme Court is constitutionally designed to remedy. It is appropriate that this Court grant this petition for certiorari and set forth a uniform standard to the questions presented.

For the foregoing reasons, this Court should grant the Petitioner's Writ of Certiorari.

Date: July 7, 1997



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No. _____

IN THE

Supreme Court of the United States

October Term 1996

A. MARIA HARRIS,

Petitioner,

v.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Appendix to Petition for Writ of Certiorari

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1310

FILED
March 12, 1997

ATHILLA MARIA HARRIS,

Plaintiff - Appellant,

versus

ARLINGTON COUNTY, VIRGINIA;
ANTON S. GARDNER, County Manager;
RON CARLEE, Director, Department of Human Services;
SUSANNE EISNER, Department of
Human Services; KITTY CLARK, Department
of Personnel; KAY WEST, Department of
Human Services; MARSHA ALLGEIER,
Department of Human Services; CECILIA
TANNER, Department of Human Services;
WALTER ZAUMSEIL, Department of Human
Services,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert v. Bryan, Jr., Senior District Judge. (CA-95-853-A)

Argued: January 29, 1997 Decided: March 12, 1997

Before HAMILTON, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Anne Therese Taylor, JOHNSTON, RIVLIN & FOLEY, L.L.P., Washington, D.C., for Appellant. Scott Sanford Cairns, McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellees.

ON BRIEF: Robert O. Johnston, JOHNSTON, RIVLIN & FOLEY, L.L.P., Washington, D.C., for Appellant. Lisa Bryant-Fowler, Assistant County Attorney, Office of the County Attorney, COUNTY OF ARLINGTON, Arlington, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Athilla Harris, who was terminated as an employee of Arlington County, Virginia, appeals an order of the District Court granting summary judgment to the County and individual defendants on her claims (i) that she was discriminated against on the basis of race and disability in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000e et seq. (Title VII) and the Americans with

Disabilities Act, 42 U.S.C. § 12112, and (ii) that she was denied due process protections (based on her assertion that she was a permanent employee of the County) in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1983, 1985, and 1986. After consideration of the parties' briefs, the record, and the oral arguments of counsel, we conclude that the District Court correctly granted summary judgment to the County and the other named defendants on each of Harris's claims. Accordingly, we affirm on the reasoning of the District Court. See Harris v. Arlington County, Virginia, No. 95-853-A (E.D. Va. Dec. 22, 1995).

AFFIRMED

Filed March 12, 1997.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 8, 1997

No. 96-1310
CA-95-853-A

ATHILLA MARIA HARRIS

Plaintiff - Appellant

v.

ARLINGTON COUNTY, VIRGINIA;
ANTON S. GARDNER, County Manager;
RON CARLEE, Director, Department of Human Services;
SUSANNE EISNER, Department of
Human Services; KITTY CLARK, Department
of Personnel; KAY WEST, Department of
Human Services; MARSHA ALLGEIER,
Department of Human Services; CECILIA
TANNER, Department of Human Services;
WALTER ZAUMSEIL, Department of Human
Services

Defendants - Appellees

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court
/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

ATHILLA MARIA HARRIS

Plaintiff,

v.

ARLINGTON COUNTY, VIRGINIA, et al.,

Defendants.

FILED
DEC 22 1995

CIVIL ACTION NO. 95-853-A

ORDER

For the reasons set forth in the Memorandum Opinion this date filed, it is hereby

ORDERED that defendants' Motion for Summary Judgment is granted, and this action is dismissed.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 22, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

ATHILLA MARIA HARRIS

Plaintiff,

v.

ARLINGTON COUNTY, VIRGINIA, et al.,

Defendants.

FILED
DEC 22 1995

CIVIL ACTION NO. 95-853-A

Memorandum Opinion

This matter is before the court on defendants' motion for summary judgment. For the following reasons, that motion is granted.

Plaintiff filed this lawsuit alleging disability and race discrimination in her employment with Arlington County, Virginia. Plaintiff is a black woman with multiple sclerosis, a disability which substantially limits her ability to perform manual tasks. The facts and documentation in this case are voluminous and demonstrate that, despite plaintiff's claims, the County and its employees made every effort to accommodate plaintiff in the two positions she held. Despite these accommodations, and despite the fact that the County gave plaintiff numerous opportunities to improve her performance, the County concluded that plaintiff was not qualified to continue her employment. Both before and after her termination, the County provided plaintiff with sufficient due process protections.

I. FACTUAL BACKGROUND

Arlington County hired plaintiff as a Job Development Specialist in November 1989. After a one year probation, she achieved permanent status and began receiving regular performance evaluations. Her first two evaluations were negative. Plaintiff contested these evaluations as unfair, in one case filing an Equal Employment Opportunity ("EEO") complaint with the Arlington County Equal Opportunity Office. In response to the EEO investigation, the County implemented an accommodation plan to help plaintiff improve her performance. Despite these efforts, plaintiff again received a negative performance appraisal in April 1992. At that time, plaintiff worked with a white, non-disabled woman who received a satisfactory work evaluation. Plaintiff alleges that the disparity in their evaluations is an example of the racial discrimination she suffered in her employment. Plaintiff maintains that her performance was better than the white co-worker's performance.

As a result of plaintiff's documented difficulties working with her supervisors and co-workers in her position as Job Development Specialist, plaintiff requested a transfer. Plaintiff accepted a new position as an Eligibility Worker-I which involved determining eligibility for various forms of public assistance, such as food stamps. This second job was a lateral transfer, with no reduction in pay. Plaintiff understood that this position required a new probationary period of one year. The parties dispute whether this new position changed plaintiff's status as a permanent employee.

In August 1992, before plaintiff began her new job, the County conducted an extensive review of the position's requirements in order to accommodate plaintiff's multiple sclerosis. The personnel department consulted with plaintiff and her personal neurologist to understand her condition and her limitations. Kitty Clark, the County EEO Specialist arranged for the National Rehabilitation Hospital of Washington, D.C. to perform a job evaluation and make recommendations. A second worksite evaluation was completed in October 1992 by the

Virginia Department of Rehabilitation Services. In both instances, the evaluators consulted with plaintiff and her supervisor.

After these reviews, the County implemented the following accommodations for plaintiff: 1) plaintiff was provided an energy efficient "systems desk," a personal printer located with her computer to minimize the need for walking, hand supports to reduce typing fatigue, a tape recorder to reduce plaintiff's need to take notes, and a phone headset to ease neck muscle fatigue; 2) plaintiff was given a temperature-controlled room to minimize tiredness; 3) the County modified work procedures to allow plaintiff to interview clients at her desk rather than in conference rooms to minimize walking; 4) rubber stamps with her name and other information and computerized forms were provided to reduce plaintiff's need to write by hand. There is some dispute about how quickly some forms were computerized. However, the County agreed to reduce plaintiff's caseload to about 150-175 cases because plaintiff had difficulty working as quickly as her non-disabled co-workers. Other eligibility workers were expected to handle approximately 530 cases.

Despite these extensive accommodations, plaintiff performed unsatisfactorily. Kay West, plaintiff's supervisor, conducted her annual performance evaluation in March 1993. Ms. West rated plaintiff's performance, overall, as "Needs Improvement." West expressed a concern that, even after an extended six month policy training period, plaintiff could not easily discuss the various AFDC, food stamp, and Medicaid policies and how these policies impacted a client's situation. Plaintiff contested this evaluation, and blamed poor accommodations for her unsatisfactory performance.

The next few months showed improvement in some areas, but in June 1993, Ms. West again gave plaintiff an overall rating "Needs Improvement." Given plaintiff's drastically reduced case load, Ms. West was concerned about continued

errors in calculating AFDC grants and food stamp allotments, as well as coding of data entry documents and case documentation. To the extent plaintiff was successful, it was only under intense supervisory review and scrutiny. Ms. West informed plaintiff that if her performance was not satisfactory by the end of August 1993, the County would be forced either to extend her probation or to recommend termination.

The County decided to give plaintiff another opportunity to achieve proficiency in her position. Her probationary period was formally extended to February 12, 1994. Once again, Ms. West determined that her performance had not improved in the critical areas, and on February 28, 1994 she recommended termination. The County, however, through Department of Human Services Director Ron Carlee, continued to extend plaintiff's probationary period through the spring and summer of 1994 to help plaintiff find job opportunities elsewhere. Plaintiff's attorney was included in many of the conversations between Mr. Carlee and plaintiff. Finally, in February 1995, after numerous meetings and written communications between plaintiff, her attorney, and Mr. Carlee, the County decided to terminate plaintiff's employment. Mr. Carlee informed plaintiff in writing of her right to file a written statement with the County Manager setting forth her position within five calendar days after receipt of his termination recommendation. Although plaintiff did not challenge Mr. Carlee's recommendation of termination, she did initiate proceedings to challenge her termination before the County Civil Service Commission. Plaintiff's dismissal became effective March 21, 1995.

II. LEGAL CONCLUSIONS

Upon consideration of the parties' submissions, the court concludes that the County articulated legitimate non-discriminatory reasons for its employment decisions regarding plaintiff. Even if plaintiff could state a *prima facie* case of race

discrimination, she has not shown that the County's stated reasons for her transfer and subsequent discharge--i.e., plaintiff's inability to perform adequately as a Job Development Specialist and inability to master the basic elements of AFDC, food stamp, and Medicaid policies--are pretextual. Instances of supervisory comments that plaintiff's performance was "very professional, an asset. . ." are insufficient to create an issue of pretext.

Similarly, plaintiff's claim of disability discrimination under the Americans with Disabilities Acts and Section 504 of the Rehabilitation Act of 1973 fails. The court finds that the County bent over backwards to accommodate plaintiff's disability. The court is not persuaded by the parties' disagreement over the computerized forms. The County determined that plaintiff's unsatisfactory performance was the result of her poor understanding of public assistance policies, not the result of uncomputerized forms. Despite some evidence from plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the management decision that she was unable to perform the essential functions of her job must be given some weight.

The same considerations that warrant summary judgment on plaintiff's claims of race and disability discrimination warrant dismissal of plaintiff's §§ 1981, 1983, 1985, and 1986 claims. These claims are all based on the same allegations. The question whether plaintiff was a permanent or a probationary employee does not affect the court's judgment. Even if plaintiff was a permanent employee and entitled to due process protections, she clearly was given all the protections she was due. Finally, the court's decision renders it unnecessary to reach the question of statute of limitations for these activities or the issue of qualified immunity for County officials.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 22, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

ATHILLA MARIA HARRIS

Plaintiff,

FILE
JAN 26 1996
CLERK

v. CIVIL ACTION NO. 95-853-A

ARLINGTON COUNTY, VIRGINIA, et al.,

Defendants.

ORDER

This matter is before the court on plaintiff's motion to reconsider/amend the entry of summary judgment. Upon consideration of the plaintiff's submission, it is hereby

ORDERED that:

Plaintiff's motion is denied. The court concludes that nothing has been advanced in this motion that was not heard previously.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
January 26, 1996

Supreme Court, U.S.
FILED
AUG 18 1997
CLERK

No. 97-114

In The

Supreme Court of the United States

October Term, 1996

A. MARIA HARRIS,

Petitioner,

vs.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

Should this Court review the decision below where the District Court and the Court of Appeals followed well established precedent and the undisputed facts established that summary judgment was appropriate on Harris' claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973 because:

a. The County spent four years implementing numerous accommodations to Harris' disability, but she still failed to perform at a level of competence acceptable to her supervisors;

b. Harris presented no evidence of race or disability discrimination; and

c. Virtually all of Harris' claims were barred by the statute of limitations.

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STATEMENT OF THE CASE

The Petition in this case misstates the record facts which led the courts below to dismiss Petitioner's claim because of a total lack of any competent evidence of disability discrimination. Both Petitioner's Questions Presented and her Statement of the Case proffer what she *wishes* this case had been about, rather than the case she actually presented to the District Court and to the Court of Appeals.

When Petitioner Athilla Maria Harris notified Arlington County that she needed accommodations to her multiple sclerosis ("MS"), it undertook a four year effort to provide extensive accommodations after conferring with Harris, her personal physician, the National Rehabilitation Hospital and the Virginia Department of Rehabilitative Services. Despite implementation of *all* recommended accommodations, and many others, she failed to perform the essential function of her job — applying County and federal policy to determine eligibility for welfare benefits. After extensive counseling and conferences with Harris and her counsel, she was terminated.

The District Court granted summary judgment, finding that even assuming a *prima facie* case, Harris failed to show the County's reason for termination — inability to perform — was a pretext for discrimination.

As detailed below, there is no cause for this Court to review this case specific determination, which raises no important issues of federal law and presents no conflict among the circuits.

A. The Petition Misrepresents the Record Below.

Arlington County hired Harris in November, 1989 as a Job Development Specialist in the Arlington Employment Center ("AEC") of the County's Department of Human Services

("DHS"). Within four months of her hiring, Harris' supervisors counseled her regarding problems with her performance at the AEC. These problems continued into 1992 through two changes in Harris' supervision.[1] Ultimately, Harris requested in March, 1992 that DHS management attempt to find another position for her outside the AEC due to what she described as a "very difficult" working relationship with her third supervisor, Karis Obrenski. Pl. Dep., Ap. 511-12.[2] Indeed, Harris noted in her March, 1992 calendar that she and Obrenski just did not "get along." Ap. 441.

Harris requested a transfer out of the AEC. Pl. Dep., Ap. 511-12. Ron Carlee, DHS Director, agreed that Harris and her supervisors' differences constituted "an unworkable situation," not conducive to productivity. When Harris expressed an interest in work in the Bureau of Assistance Programs which handles eligibility determinations for various forms of public assistance, including food stamps, Aid to Families and Dependent Children ("AFDC") and Medicaid, Carlee offered her the position of EW-I in the Family and Children Unit of the Eligibility Unit.

As soon as Harris decided to move to the EW-I position, the County EEO Specialist, Kitty Clark, began reviewing Harris' new job for reasonable accommodation needs. Clark and DHS management knew from Harris' tenure at AEC that she had MS and had undertaken the process to reasonably accommodate her

1. Harris devoted much of her Complaint to allegations of alleged disability discrimination, race discrimination and retaliation she claimed to have suffered during her employment at the AEC between 1991 and mid-1992. Harris did not file suit until June 22, 1995. It is also undisputed that Harris filed no charge of discrimination regarding these alleged events with the EEOC or any EEOC deferral agency. Accordingly, any discrimination claims Harris sought to pursue based on these matters were barred by Harris' failure to file a charge.

2. Where important disputes exist as to the record below, Respondents have cited to the Joint Appendix submitted to the Court of Appeals.

in the AEC position. At that time, the County had ordered an administrative physical for Harris to determine what sort of limitations her MS posed for her AEC work, and how they might be accommodated. The County consulted with Harris and her own neurologist, Dr. Michael Batipps, regarding her condition. Clark then arranged for a worksite evaluation of Harris' AEC job by the National Rehabilitation Hospital ("NRH") of Washington, D.C. NRH performed the job evaluation and reviewed the recommendations of Dr. Batipps which included providing Harris with a computer for word processing. NRH recommended the following additional accommodations: (1) adaptive writing aids (*e.g.*, pencil grips) for any writing necessary in the job after provision of the computer; (2) a sloped writing surface for greater comfort; (3) a cassette recorder to decrease Harris' need to take notes during meetings; (4) a telephone equipped with a speaker and recording option; (5) a telephone headset to eliminate the stress of holding the phone while writing or using the computer; (6) removal of extraneous objects in workplace walkways (to avoid accidents created by decreased coordination, common to MS patients); (7) enforcement of the County's handicapped parking restrictions to ensure that Harris was generally able to park close to the work building; and (8) a fan to control extremes in temperature at her workstation. Finally, to address comments by Ms. Harris that her supervisors and/or co-workers might be insensitive to her needs as a person with a disability, NRH suggested (9) sensitivity training for her co-workers.

Upon Harris' transfer to EW-I, Clark continued the County's accommodation process by determining that, because the EW-I position was similar to the AEC position, each of the accommodations implemented for Harris in the AEC should be included in her EW-I RAP. Clark also requested another worksite evaluation in October, 1992, this time by the Virginia Department of Rehabilitative Services ("VDRS"). The VDRS evaluator consulted with Harris and her supervisor to understand her

accommodation needs, and reviewed the EW-I position description, as well as the key job performance elements and standards on which her performance would be evaluated. Harris agreed that an Eligibility Worker must know how to apply public assistance policies, make decisions about eligibility or continuing eligibility, and put the results of those policy-guided decisions into various forms and reports. Pl. Dep., Ap. 519-22. An Eligibility Worker is expected to perform these duties with only general supervision: "[W]ork assignments are reviewed by immediate supervisor, but individual is expected to work independently according to standard procedures and/or instructions." Ap. 242.

The VDRS evaluator concurred with Clark's decision that accommodations implemented for Harris in the AEC position be carried over to the EW-I position. The VDRS made the following additional accommodation recommendations for the EW-I position: (10) that Harris' work station configuration allow her to have a computer, printer, policy resource manuals and other working materials in the same location; (11) that Harris' computer be equipped with WordPerfect and dBase software; (12) that necessary furniture be purchased to accommodate the optimum workstation configuration; (13) that Harris have her own copies of the public assistance program policy manuals, and that the binders be placed in holders at her workstation so that Harris could pull down one binder at a time without getting up; (14) that Harris have a stable chair with armrests; (15) that Harris have a stable work surface; (16) that provisions be made to regulate extremes in temperature, e.g., a fan and/or space heater; (17) that Harris be provided a backpack or assistance in carrying case files from one floor to another; (18) that Harris have additional adaptive writing aids (thicker pens and pencils or pencil grips); and (19) that Harris disclose her disability to co-workers to increase their sensitivity to her needs and understanding of her disability.

Clark incorporated *each* of the VDRS accommodation

recommendations into a second RAP for Harris. Clark also added an accommodation beyond those recommended by VDRS: computerization of various forms required to be filled out by Eligibility Workers to reduce the amount of handwriting required of Harris. Each of these accommodations was in place by April 20, 1993. Indeed, the only accommodation that Harris contends was not "fully" implemented was the computerization of every possible public assistance form. Cmplt., Ap. 36-39. DHS management acknowledged delays in the forms automation process and, as an interim accommodation, drastically reduced Harris' caseload. Although Eligibility Workers are normally expected to gain sufficient proficiency within five months of hiring to carry 538 cases, Harris was only expected to carry from 150 to 175 cases (25% of other workers' caseloads). Ap. 382. This accommodation was included in Harris' EW-I RAP. During this process, Kay West, Harris' supervisor, pre-selected cases to be assigned to Harris to ensure that they involved minimal complexity without excessive issues or determinations.

The County provided Harris an extensive training period for her new position. For five weeks Harris "shadowed" another Eligibility Worker to familiarize herself with the day-to-day Eligibility Worker routine. Next, Harris spent much of her time reviewing public assistance policy manuals, performing self-tests, and in other policy training (including two 5-day state training programs). Harris was not expected during this period to perform at the level of other Eligibility Workers.

West met with Harris to discuss her training and performance one month in advance of her March 1993 annual review. West informed Harris of her concern that even after six months of policy training, Harris could not easily discuss "various aspects of how a client's situation impacts the AFDC, Food Stamp and Medicaid programs in different ways." Harris acknowledged in this meeting that she did find the differing

policies among the programs "confusing" and difficult to "keep straight." Ap. 386-88. West also expressed concern that Harris was having difficulty with AFDC income calculations. In the March evaluation, West rated Harris' performance, overall, as "Needs Improvement."

In June, 1993, West again rated Harris' overall performance as "Needs Improvement." Since March, West had reviewed all actions submitted by Harris and issued a written assessment of each case. While recognizing Harris' improvement in some areas, she noted the need for improvement in the critical areas of reducing Harris' error rate in calculating AFDC grants and food stamp allotments, as well as coding of data entry documents and case documentation. West also notified Harris that she would be required at the end of her probationary period (September 1993) to make a recommendation whether Harris should be certified with permanent status in the EW-I position. She told Harris that she would base that recommendation on her improvement during the next three months. West also included specific recommendations as to how Harris could accomplish her goals.

At the end of that period, West determined that Harris' rating would be overall "Unsatisfactory" and that she would be unable to recommend Harris for certification with permanent status, which would result in her discharge.

Harris complained to her department head, Ron Carlee, that it was unfair to evaluate her at this time, despite the fact that she had been working as an EW-I for a year. Her position was that her accommodations were not complete because the forms automation component of her RAP was not completed. Cmplt., Ap. 36.

Carlee and West disagreed because in their estimation it was not necessary that all 100 public assistance forms be

available to Harris on computer to determine her suitability for the position, especially given the small percentage of these forms that Harris routinely used. However, more important to Carlee and West was the fact that Harris simply had not been able to demonstrate that she could consistently apply public assistance policy to make eligibility determination decisions. Moreover, to the extent that Harris had any success in this area, it was only with intense supervisory review and scrutiny. She had not demonstrated to West that she could work independently without an unacceptable error rate. Nevertheless, Carlee deemed it appropriate to extend her probationary period to allow her to achieve proficiency with the addition of more computerized forms.

Over the extended probationary period (between September, 1993 and February, 1994), Harris' performance did not improve in the critical areas which had concerned West for the past year. Accordingly, West recommended separation from employment. West concluded that even after nearly 18 months Harris had not demonstrated that she had mastered (or that she would master) the basic elements of AFDC, Food Stamp and Medicaid policies. Moreover, Harris had not demonstrated the ability to work independently without significant errors, even though all computer forms necessary for her pre-screened case load, which was still only 25% of other caseworkers' load, were available for Harris.

Despite the performance deficiencies detailed by West, Carlee did not immediately process Harris' termination. Instead, he extended her probationary period, and in consultation with Harris and her counsel, Carlee worked to find her another position with the County. From the spring through fall of 1994, neither Harris nor her attorney suggested that any further accommodations were necessary for Harris. Instead, they indicated that Harris was seeking alternative employment outside the County.

On September 13, 1994, Carlee wrote to Harris' counsel and told her that he had been unable to find an appropriate alternative placement for Harris in the County.[3] *Id.*

Although Harris' job performance did not improve, Carlee continued Harris' probation until February 15, 1995, when he formally recommended to County Manager Gardner that Harris be separated from her employment. Carlee determined that she simply could not satisfactorily perform the critical functions of the EW-I position despite accommodation. Gardner accepted Carlee's termination recommendation and informed Harris of her separation from County service on March 21, 1995.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE UNDISPUTED FACTS DO NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH REQUIRE THIS COURT'S ATTENTION.

In an attempt to create important questions of federal law and convince this Court to accept certiorari jurisdiction, Harris has misrepresented the undisputed facts and the record below. For example, without any record support, Harris characterizes her 1992 transfer from her first position as a Job Development Specialist to the EW-I position as an "accommodation" and suggests that this Court must determine whether this reassignment was a "reasonable" accommodation. She further suggests that this Court must then determine whether her status

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3. Harris herself had identified only one County placement that she deemed appropriate, a position in the County's Office for Persons with Physical Disabilities. No such position existed. Indeed, in that county office there was only one position allocated, and it was filled. *Id.*; Carlee Dep., Ap. 463-64.

as a "qualified employee" should have been determined in her original position or the position to which she was reassigned and whether she lost her protected status as a qualified employee under the ADA after being reassigned. However, a review of the facts and the decision of the District Court which was adopted by the Circuit Court below demonstrates that the issues identified by Harris were not determined below simply because the undisputed facts did not present those issues for determination.

A. The undisputed facts demonstrated that Harris' reassignment was a result of her inability to get along with her supervisor and was not an accommodation to her disability.

The record evidence demonstrated that the reason for Harris' transfer was not a request for accommodation. Harris requested a transfer from her Job Development Specialist position in the AEC as early as March, 1992[4] because she believed that the transfer was the only solution to an unworkable situation with her supervisor. In her Petition for Writ of Certiorari, Harris acknowledges that her transfer was a result of factors unrelated to disability. Petition for Writ of Certiorari at ¶ 6. Although she refers to this transfer as a "reasonable accommodation" by the County, she presented no evidence to the District Court and has presented no facts to this Court which would support such a conclusion.

Because the evidence presented did not support the conclusion that Harris ' transfer to the EW-I position was an accommodation to her disability, neither the District Court nor the Fourth Circuit considered whether that transfer was a "reasonable accommodation".

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4. Any claim regarding this transfer or its reasonableness if it was an accommodation is clearly barred by the statute of limitations.

B. The County had every reason to expect that Harris would be able to perform the essential functions of the EW-I position.

Even if the transfer had been an accommodation, the undisputed facts do not support Harris' claim. Harris alleged that she was transferred to a position which would aggravate her disability and in which she would not be able to perform. However, the record demonstrated that Harris suggested a transfer to this position and was given adequate time to evaluate its requirements.

Before making the decision to transfer to the EW-I position, Harris was allowed to shadow another EW-I for several weeks. Only after having done so did Harris accept the transfer to that position. Ap. 249, 191; Complt., Ap. 29. Harris undisputedly made the conscious decision to move to this position. Although Harris claims that the transfer was not an "appropriate reassignment", she produced no evidence to support this claim. Harris' education and background suggested that she should be able to handle the requirements of the EW-I position. Harris herself evaluated the requirements of the job at length and considered herself to be able to handle those requirements. Under those circumstances, it was reasonable for the County to assume that with training, Harris could in fact satisfy the essential functions of the position.

It was only after Harris had been in her position for a substantial amount of time that it became apparent that she would not or could not properly apply policy as required in her position. Based upon these facts, neither the District Court nor the Fourth Circuit considered whether transferring an employee to a position where she could not perform would be a "reasonable" accommodation. The undisputed facts simply did not raise such a question.

C. The record evidence did not support Harris' current claim that the County failed to accommodate her.

The District Court found that the undisputed facts established that "the County bent over backwards to accommodate Harris' disability". The undisputed evidence demonstrated that the accommodations given to Harris included: (1) conferring with her personal physician; (2) site evaluations by both NRH and VDRS; (3) purchase of a computer and printer for Harris' own use; (4) twelve weeks of computer and WordPerfect training at a cost of $15,000; (5) a cassette recorder; (6) a telephone headset; (7) a fan to circulate air which was subsequently replaced by moving Harris to an office with a separate temperature control; (8) continuous removal of all extraneous objects; (9) continued use of accessible parking; (10) a redesigned work station and furnishings at a cost of approximately $2,500; (11) redistribution of policies into smaller, lighter notebooks; (12) disability awareness training for the entire Bureau of Assistance Programs; (13) special pencil and pen grips to aid with Harris' writing; (14) permitting Harris to interview clients at her desk in order to eliminate the need for walking and carrying files; (15) computerization of social services forms; and (16) as an interim accommodation, the reduction of Harris' assigned EW case load from 538 to a range of 150 to 175. The undisputed evidence in this case further demonstrated that each and every one of these accommodations was in fact implemented.

Nonetheless, Harris has claimed that the "principal" accommodation — useable computer forms — was never implemented. Harris has provided no citations to the record to support these allegations, and in fact, cannot do so. None of the individuals who participated in Harris' accommodation process testified or even supported the allegation that the computerization of forms was the "most important accommodation". To the contrary, the undisputed evidence

demonstrated that this was never envisioned to be a "key" accommodation. Harris' own doctor did not suggest that the County computerize its forms. Neither of the two independent agencies who, with her assistance, came in and did extensive reviews of the requirements and specific duties of Harris' job recommended that the County computerize its public assistance forms. This accommodation was suggested *by the County* to further assist Harris. However, at no time was it contemplated that this be the "most important accommodation," nor was it ever contemplated that Harris could not do her job unless every single form had been placed on the computer.

Moreover, the undisputed evidence in this case demonstrated that usable computer forms were, in fact, created and made available to Harris on an ongoing basis. Harris and every other witness questioned about the computer forms agreed that the computer forms created using the PERFORM System functioned properly once they were placed on the system. The only dispute arises from Harris' unhappiness with the speed in which these forms were placed on the computer.

Harris bore the burden of establishing that a reasonable accommodation existed that would have enabled her to perform the essential functions of her job. *See Tyndall v. Nat'l Educ. Centers, Inc.*, 31 F.3d 209, 213 (4th Cir. 1994); *Pandazides v. Virginia Bd. of Educ.*, 804 F. Supp. 794, 801 (E.D. Va. 1992), *rev'd on other grds.*, 13 F.3d 823 (4th Cir. 1994). Harris failed to establish that further computerization of forms constituted such an accommodation.

In the present case, the County went beyond what was required by the ADA or Rehabilitation Act to accommodate Harris in her job. Indeed, the County even dropped quantity standards applicable to an EW-I, which it was not required to do. *Myers v. Hose*, 50 F.3d 278, n.2 (4th Cir. 1995) (An employer "cannot be expected to alter the facilities or adjust the

specifications of [Harris'] particular post"); *see also Pandazides*, 804 F. Supp. at 801-02; ADA Technical Compliance Manual, Ch. 1. Harris' after-the-fact insistence on every form being automated regardless of her need for it, its relevance to her cases, and the degree of writing needed would require defendants to undertake futile, unnecessary measures. Harris simply has identified *no* accommodation which would remedy the undisputed problem with her work: her inability to correctly and independently apply public assistance policies to determine benefit levels for benefit recipients.

D. Harris' status as a "qualified individual" with a disability was not at issue below.

In her Petition, Harris suggests that an important issue of federal law revolves around whether she lost her status as a "qualified individual" when she was transferred, or alternatively whether the determination of whether she was a "qualified employee" should have been made based on her performance in her initial position. This issue is nothing more than a red herring. The decision of the District Court which was adopted by the Fourth Circuit demonstrates that for the purposes of ruling on the County's Motion for Summary Judgment, the Court assumed that Harris had established that she was a "qualified individual". The Court granted Summary Judgment in favor of the County not because it found that Harris was not entitled to protection under the ADA or the Rehabilitation Act, but rather because despite being given every accommodation, Harris failed to perform the requirements of her position. Accordingly, the question which Harris asks this Court to answer had no bearing on the outcome of the case.

E. Based upon the undisputed facts, termination rather than reassignment was appropriate.

During her tenure as an Eligibility Worker, even with extensive reasonable accommodations and a simplified caseload

which was one-quarter of the normal caseload, Harris did not demonstrate that she could perform the most essential part of her job: applying policy correctly to determine recipients' benefits.

Harris admitted that the ability to learn, retain and correctly apply benefits policy was an essential function of the EW-I position. Indeed, it is the very reason the position exists. It was also abundantly clear that Harris did not correctly apply the policies to her simplified cases and correctly determine benefits despite having over two and one-half years to do this with a caseload equivalent to twenty-five percent of other workers. Her supervisor stated, without challenge, that it would normally take a successful new worker approximately three to six months with a caseload four times as heavy as Harris' (*not* pre-screened for simplicity) to correctly apply policy and generate work that is substantially correct. However, even with a simplified, reduced workload, Harris made the same policy errors over and over again. This problem with Harris' understanding and application of policy was repeatedly documented over Harris' two years as an EW-I.

Harris never identified any accommodation not implemented for her that would have remedied her inability to apply policy correctly without repeated errors in judgment. Accordingly, she did not establish that she should remain in her position. Moreover, even if any duty to transfer had existed in this case, that duty would only have arisen if there were an appropriate *vacant* position. *See, e.g., Gile v. United Airlines*, 95 F.3d 492 (7th Cir. 1996). Neither the County nor Harris identified any vacant positions appropriate for Harris, despite the extension of Harris' probationary period to look for such an opportunity.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE OPINION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS.

A. There is no conflict over the duty to reassign as an accommodation, and this issue was not decided below.

Harris claims that although the Fourth Circuit has recognized in *dicta* that reassignment is a statutorily defined form of reasonable accommodation, it failed to reverse the District Courts' grant of summary judgment on that issue in this case. Neither the Fourth Circuit nor the District Court ruled on this issue simply because the facts did not require them to do so. Based on the undisputed facts, the District Court found that Harris had been reasonably accommodated in her EW-I position. Harris provided no evidence to support her contention that her desire for a reassignment was related to her disability. Instead, the overwhelming undisputed evidence established Harris' disability was reasonably accommodated in the EW-I position but that she did not grasp the basic policy necessary to properly perform the requirements of this position for reasons unrelated to her disability. Thus, no duty to accommodate this performance deficiency ever arose.

Harris attempts to avoid these facts by arguing that her 1992 transfer was a reasonable accommodation, thus the County had some greater duty to then transfer her again and again if the reasonable accommodation failed. Such a rule fails both in theory and in fact. If that were the law, an employer could never terminate a disabled employee, because each time the employee failed to satisfy the essential functions of the current position, the employer would be required to find another position which the employee might be able to fill.

However, even if that were the law, it should not apply to a situation such as this where the employee requested a transfer initially, not as a reasonable accommodation, but because she wasn't getting along with her supervisor.

Moreover, Harris' inability to perform the requirements of her position was not related to her disability. The issue of whether reassignment would have been a reasonable accommodation would only be an issue in this case if Harris' failure to perform the requirements of the EW-I position was a result of or in some way related to her disability. However, the undisputed facts established that this was not the case. Neither the Fourth Circuit nor the District Court were required to consider whether reassignment would in certain circumstances be a reasonable accommodation. Harris is asking this Court to render an advisory opinion on this issue when the facts in the case did not present that issue for determination.

B. There is no conflict regarding the "analysis of plaintiff's evidence".

Harris argues at page 15 of her Petition that the Fourth Circuit's opinion is in conflict with that of other circuits regarding the analysis of Harris' evidence. However, she fails to identify any decision with which there might be conflict. Instead, Harris simply argues that the Fourth Circuit should have been "impressed" by her evidence. Petition at p. 17. Certiorari review is not intended to seek a *de novo* review of evidence. Instead it is intended to assure consistency within the circuits and the appropriate interpretation of federal law. Granting review of Harris' claims would accomplish neither purpose.

Harris appears to suggest that the Fourth Circuit's opinion is somehow in conflict with the opinion of the Sixth Circuit's in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996). But once again she failed to identify the conflict.

III.

THE *McDONNELL-DOUGLAS* ANALYSIS WAS THE APPROPRIATE ANALYTICAL FRAMEWORK TO EVALUATE HARRIS' CLAIM.

Harris dedicates much of her Petition to arguing that the *McDonnell-Douglas* analysis was not the appropriate framework to test her claim because she provided direct evidence of discrimination. Specifically, Harris claims that the Fourth Circuit "has apparently failed to recognize that *McDonnell-Douglas* burden shifting is inappropriate in cases which plaintiff proffers direct evidence of unlawful actions".

The opinion of the Fourth Circuit in this action did not address this issue in any way, simply because Harris did not produce direct evidence of discrimination. "Direct evidence" of discrimination is evidence that the employer "announced, admitted or otherwise unmistakenly indicated that [the forbidden consideration] was a determining factor" in the employer's decision. *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 (4th Cir. 1982) (citing *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981)). It "is evidence which, if believed, *would prove* the existence of a fact . . . *without any inference* or presumptions." *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995), *rev'd on other grds.*, 116 S. Ct. 1307, 64 U.S.L.W. 42, 43 (1996). In other words, direct evidence is "evidence of conduct or statements that reflect directly the alleged discriminatory attitude and bear directly on the contested employment decision". *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

Harris provided no such evidence to the District Court or the circuit court. Accordingly, the legal issue which Harris now asks this Court to determine, *i.e.*, whether the *McDonnell-*

Douglas analysis would be appropriate if she had presented direct evidence, was not considered by either of the lower courts. Therefore, this case presents no issue in need of resolution by this Court.

CONCLUSION

The issues presented by the Petitioner involve neither a substantial federal question nor a split among the circuits. Therefore, Respondents pray that Certiorari be denied.

Respectfully submitted,

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No. 97-114

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IN THE

Supreme Court of the United States

October Term 1996

A. MARIA HARRIS,

Petitioner,

v.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In claims brought under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* --

1. Whether reassignment of an employee to a position which the employee allegedly does not have the knowledge, skills or abilities to perform is a "reasonable accommodation."

2. Whether reassignment of an employee to a position which aggravates employee's known disability, and, in which employer fails to provide the agreed upon principal accommodations is a "reasonable accommodation."

3. Whether an employee's status as a "qualified employee" is determined in her original position or in the position to which she has been reassigned and in which the employer asserts she does not have the knowledge, skills or abilities to perform.

4. Whether a "qualified employee" loses her protected ADA status by being reassigned to a position which the employer asserts she does not have the knowledge, skills or abilities to perform.

5. Whether, after reassignment to a position which the employer asserts she does not have the knowledge, skills or abilities to perform, an employer's refusal to further reassign the employee to a different vacant position or return employee to her first position when it became vacant is an actionable failure to accommodate.

6. Whether an employee establishes a *per se* failure to accommodate claim upon showing that for 11 month-

period employer failed to provide agreed-upon principal accommodations; employer evaluated employee's performance during that period as warranting termination; and employee was terminated.

7. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims failure to accommodate.

8. Whether employee proffers sufficient direct evidence of disability discrimination to survive defendants' motion for summary judgment upon showing that employer, having reassigned employee to a position for which it asserts employee is "unqualified"; which position aggravates employee's known disability; and, in which it fails to provide the agreed upon principal accommodations, terminated employee after refusing employee's accommodation requests to be returned to her first position when it became vacant or to be reassigned to a different vacant position.

9. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims retaliation.

10. Whether employee proffers direct evidence of unlawful retaliation upon showing that employer failed to provide reasonable accommodations and discriminated against her subsequent to employee's filing of two Equal Employment Opportunity complaints alleging disability and race discrimination.

11. Whether the court below erred in holding that, on employer's motion for summary judgment on employee's ADA and Rehabilitation Act claims, despite evidence from

plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the employer's decision is conclusive on issue of whether employee was able to perform the essential functions of her job.

12. Whether plaintiff's right to receive prior to termination the fact finding process set forth in the County's regulations for permanent employees is protected by the Fourteenth Amendment.

13. Whether employee proffers sufficient direct evidence of race discrimination under Title VII to survive defendants' motion for summary judgment upon showing that employer accommodated similarly-situated white, disabled co-worker.

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42 U.S.C. § 12112(b)(5)(A) 10

REPLY TO BRIEF IN OPPOSITION

I. THE "REASONABLENESS" OF A REASSIGNMENT ACCOMMODATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. Reassignment to a position which aggravates the employee's known disability; for which the employee is allegedly unqualified; and, in which the employer fails to provide the agreed upon accommodations is not a "reasonable" accommodation.

In its most basic form, one of the important issues of federal law which this case raises is: May an employer, under the guise of providing a reasonable accommodation under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, reassign an employee to a position for which it asserts the employee is "unqualified"; which position aggravates employee's known disability; and, in which position the employer fails to provide the agreed upon principal accommodations; then fire the employee for alleged inability to perform the position? And further, may that employer refuse the employee's accommodation requests to be returned to her first position when it became vacant, or, to be reassigned to a different vacant position?

The County attempts to deflect scrutiny by asserting that Mrs. Harris has misrepresented the facts. However, it is Counsel for the County who has misrepresented the facts in this case.

The County's principal argument in its opposition is that Mrs. Harris' reassignment to the Eligibility Worker I position was merely a "transfer" and not an accommodation so the statutes do not apply, the reassignment cannot be reviewed under the ADA or the Rehabilitation Act. Brief in Opposition at 8.

The County tries to wish away the documentary evidence

and deposition testimony presented to but ignored by the District Court and the Court of Appeals proving that the reassignment was an accommodation, and *was treated as such by the parties*.

The County baldly asserts that: "without any record support, Harris characterizes her 1992 transfer from her first position as a Job Development Specialist to the EW-I position as an 'accommodation' . . .". Id. And, "[b]ecause the evidence presented did not support the conclusion that Harris' transfer to the EW-I position was an accommodation to her disability, neither the District Court nor the Fourth Circuit considered whether that transfer was a 'reasonable accommodation.'" Brief in Opposition at 9.

Mrs. Harris' *personnel records* prove that she was reassigned as an accommodation. She submitted the following evidence with her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment ("Pl.'s Mem. Opp. Summ. J.") which is contained in the Joint Appendix:

- **Reasonable Accommodation Plan** ("RAP") written by Kitty Clark, Selective Placement Program Manager, Personnel Department, dated September 16, 1993, listing "Accommodations Agreed to & Accepted by Agency & Employee." The first item on the list of the agreed-upon accommodations is "Reassignment to a vacant position, DHS/Social Services, Eligibility Worker I, lateral position." (Pl.'s Mem. Opp. Summ. J., Ex. 55, page two.)

- **Memorandum** written by Kitty Clark, dated November 9, 1993, describing the RAP. The "8/11/92 date was when [Ron Carlee] the DHS Director authorized reassignment and transfer to a lateral position as an accommodation." (Pl.'s Mem. Opp. Summ. J., Ex. 57, page one.)

- **Transcript of the deposition of Ron Carlee**, Director of

the Department of Human Services ("DHS") in which department Mrs. Harris was employed, in which Mr. Carlee testifies that the reassignment of Mrs. Harris was an accommodation undertaken in lieu of implementing other planned accommodations set forth in the RAP for Mrs. Harris in her first position. Mr. Carlee testified in his deposition,

> A: . . . My bottom-line conclusion was that there was not going to be a productive working relationship there, and I would consider a transfer in that situation whether there were an EEO complaint involved or not.
> Q: In the case, it was?
> A: That is correct.
> Q: And rather than going through and trying to make do with the other accommodations, you accommodated her by transferring her?
> A: Yes.
> Q: And if she hadn't accepted this position, you, under law, would have been obligated to implement these other accommodations?
> A: Yes. And again, I can't testify to what extent they were or were not implemented at the time.

(Pl.'s Mem. Opp. Summ. J., transcript of Ron Carlee deposition, pages 109-110.)

Mrs. Harris' evidence shows that she was, indeed, reassigned as an accommodation. An employer's duty to provide a reasonable accommodation prohibits reassignment to a position which aggravates an employee's disability. See *Rhone v. United States Department of the Army*, 665 F.Supp. 734, 745-46 (E.D. Mo. 1987) (Rehabilitation Act); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985).

B. The County failed to provide Mrs. Harris promised accommodations which were essential to her ability to perform her job, and her supervisor, Kay West, knowingly evaluated her performance absent her accommodations.

The County next argues in its Brief in Opposition that even if the statutes apply they *believed* that Mrs. Harris could perform in the position to which they reassigned her; they fully accommodated her in that position; and, since they could not possibly have done anything further to accommodate her in that position they were justified in terminating her, rather than reassigning her. Brief in Opposition at 10 - 14.

Once again, the County misrepresents the record. Counsel for the County asserts that Mrs. Harris cannot cite the record for evidence that computerization of forms was the "most important accommodation," (Brief in Opposition at 11) and that the "undisputed evidence demonstrated that this was never envisioned to be a 'key' accommodation." *Id.*, at 11-12.

Mrs. Harris presented such evidence to the District Court in her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment:

- **Handwritten notes** written by Kitty Clark, the County's Selective Placement Program Manager, dated October 23, 1992, which includes the admission, "Technology - lot of forms, w[or]ksheets done manually - *key aspect*."

(Pl.'s Mem. Opp. Summ. J., Ex. 33, emphasis added.)

Mrs. Harris provided evidence that, while the County did provide other accommodations, the County did not provide the one that was *essential* to her ability to perform her position: computerization of the forms. Mrs. Harris provided further proof of the essential nature of the computerized forms accommodation through the County's *own internal memoranda*.

By the County's own admission Mrs. Harris would *not be able to perform* the essential functions of the Eligibility Worker-I position to which she was reassigned without the computerization of the forms. She presented the following evidence with her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment:

- **Memorandum** written by Walter Zaumseil, Chief, Bureau of Assistance Programs (supervisor to Kay West, Mrs. Harris' supervisor) dated November 9, 1992. In his memorandum, Walter Zaumseil made the following admissions:

> Last week I met with Lana Curtain regarding using Timm Bentley for the *programming of forms that will be required for the accommodation package* for Maria Harris. . . .
>
> I am requesting we do what is necessary to move on this piece of the accommodation plan as soon as possible. The County should contract for the required programming if existing staff resources cannot be immediately identified. I am concerned for Maria [Harris] because *she is not able to truly begin performing* as [an] Eligibility Worker I, though she is located in space with other eligibility workers. Her being in a state [of] limbo for an extended period of time is also difficult for others working around her and observing her being under utilized because their caseloads are more than double what they should be. Maria is *currently unable and not expected to perform* at the same level as other unit staff.

(Pl.'s Mem. Opp. Summ. J., Ex. 34, page one, emphasis added.)

- **Memorandum** written by Kay West (Mrs. Harris' supervisor) dated June 7, 1993. In her memorandum, stamped "Confidential," Mrs. West made the following admissions:

> I have been increasingly concerned about the pace of work on the forms part of the accommodations for Maria Harris. All of the other accommodations have been in place since April 7, however, there are still only two forms on her PC that she uses.
>
> The original work began on the forms in December. *More than forty forms* were prioritized [out of the nearly 100] and an effort was made to put them on Wordperfect. In February, when the first forms were ready, it was learned that Wordperfect was not the appropriate software for most of the forms. At that time the project was passed to Cynthia Graves to complete, utilizing the Perform software. A goal was set of having all of the forms completed by the end of March. By the end of May, we had several low priority forms, but only two that are frequently used. *Only one of them* was on Perform.
>
> Ms. Harris will be on probation until September 21[, 1993]. This is less than four months from now. *If anything can be done to speed the process of putting the forms on the Perform software, I urge that it be done. Otherwise she will not have sufficient time using full accommodations by September 21 for an adequate evaluation of her performance to be done*. If that happens, I see no alternative to extending her probationary period.

(Pl.'s Mem. Opp. Summ. J., Ex. 49, emphasis added.)

Despite her knowledge that Mrs. Harris needed "full accommodations" and "sufficient time" utilizing them to permit "an adequate evaluation of her performance," *on July 28, 1993, nearly two full months before the September 21 anniversary date noted in the memorandum,* Kay West formally evaluated Mrs. Harris' performance as insufficient for continued employment (Pl.'s Mem. Opp. Summ. J., Ex. 51). While **knowing** that the accommodations had not been provided and that she should not evaluate Mrs. Harris' performance without accommodation, Supervisor Kay West reached the decision that Mrs. Harris' performance as an Eligibility Worker I was inadequate and she should be terminated, and she never varied from that determination.

Despite recognizing that her reassignment was "not . . . a good job match" (Pl.'s Mem. Opp. Summ. J., Ex. 64) as they later termed it, and despite Mrs. Harris' requests to be returned to her first position or further reassigned, the County kept her at the position of Eligibility Worker I until they fired her.

Contrary to the misrepresentations made by counsel for the County, Mrs. Harris' evidence shows that the computerized forms were, in fact, essential to her ability to perform her job and they were her "most important accommodation." Her evidence further shows that her performance was evaluated and the decision to terminate her was made prior to the County's provision of the agreed upon accommodations.

C. The County's position is contrary to the plain language of the ADA.

The County further argues in its Brief in Opposition that they could not possibly have done anything further and termination rather than reassignment was appropriate. This is contrary to the plain language of the ADA which imposes a duty upon employers to provide reasonable accommodation which includes, by definition, reassignment.

An important question of federal law arising from this case

is: what are the parameters of the employer's duty to reassign? Is the duty limited to merely providing a reassignment to a position which aggravates the disability or which is a "bad job match" as characterized by the County in this case? Or does the statute require the employer to consider further reassignment?

Mrs. Harris proffered evidence to the District Court that she performed quite well the duties of her Eligibility Worker I position. She presented the testimony of her back-up supervisor, Maxine Shutter, who testified in her deposition that,

> -- the job requirements for Eligibility Worker I were a four-year degree or four years experience (Shutter deposition, at 38);
>
> -- no employee other than Mrs. Harris had a Master's Degree (*Id.*, at 39);
>
> -- in her experienced opinion, Mrs. Harris was capable of learning the regulations, learning the forms and performing well (*Id.*, at 70);
>
> -- as Mrs. Harris' supervisor she found her questions and progress to be similar to that of other employees (*Id.*, at 71);
>
> -- she had no concern whatsoever about Mrs. Harris' intellectual ability to make judgments and decisions regarding her work (*Id.*);
>
> -- with regard to the non-physical aspects of Mrs. Harris' work, she was equal to or comparable to her co-workers in all things except caseload size (*Id.*, at 82);
>
> -- there is no reason based on her intelligence, judgment, professionalism or work habits for her not to have a full caseload (*Id.*, at 83); and
>
> -- that Mrs. Harris' supervisor, Kay West, never expressed to her any disagreement with her opinion of Mrs. Harris' work (*Id.*, at 85).

(Pl.'s Mem. Opp. Summ. J., transcript of Maxine Shutter deposition.)

Even if, assuming *arguendo*, Mrs. Harris could not perform the requirements of the Eligibility Worker I position to which she had been reassigned, the County had a duty under the statutes to further reassign her to another position. See *Taylor v. Secretary of the Navy*, 852 F.Supp. 343, 345 (E.D. Pa. 1994). Or, it had a duty to permit her to return to her original position. See *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989).

The County asserts, in its Brief in Opposition at 14, that Mrs. Harris failed to identify any vacant positions -- this again misrepresents the evidence presented to the District Court. Mrs. Harris continuously applied for other posted County position vacancies but her applications were regularly rejected. Several of the rejection letters she received in response to her applications were attached to her Opposition to Summary Judgment, including the rejection letter informing her that she was "not qualified" for her own original position as a Job Development Specialist. (Pl.'s Mem. Opp. Summ. J., Ex. 68, 69, 70, 71, 72).

The Rehabilitation Act, which the ADA is modeled after, has been interpreted to require multiple reassignments. The County argues that a duty to reassign exists only if there is an "appropriate" vacant position. Thus, another important federal question arising out of this case is, what is an "appropriate" vacant position and to what extent does the employer have a duty to assist the employee in finding a position within its own organization?

II. WHAT CONSTITUTES "DIRECT EVIDENCE" OF DISABILITY DISCRIMINATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Counsel for the County misrepresented the record when it asserted that Mrs. Harris "did not produce any direct evidence of discrimination." Brief in Opposition at 11-12. Mrs. Harris

presented evidence that her supervisor *knowingly* evaluated her performance in the absence of accommodations. See Section I. B., *supra.*

The Americans with Disabilities Act provides, "the term 'discriminate' includes,

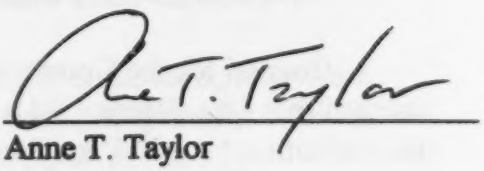
> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112 (b)(5)(A). Thus, by definition, failure to provide a reasonable accommodation *is* disability discrimination. Mrs. Harris proffered direct evidence of disability discrimination when she showed that Kay West, while *knowing* that she should *not* evaluate Mrs. Harris absent her accommodations, did just that, evaluated her performance and recommended her termination, in the absence of accommodations. Mrs. Harris produced evidence, the "smoking gun" memorandum, that proved the existence of the fact, without inference or presumptions, that the County did not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.

CONCLUSION

This Court should grant this petition for certiorari and set forth a uniform standard to the questions presented.

Date: August 28, 1997



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